STATUS OF STATE MILITIA UNDER THE HAY BILL

A NOTE in the HARVARD LAW REVIEW for December discussed under the above caption the questions involved in the recent case of *Sweetser* v. *Emerson* and, going farther, examined into the scope and constitutional basis of the Federal authority over the National Guard assumed by the Hay Bill. Rather strangely, the discussion passes over *sub silentio* the many obviously questionable means of "federalization," and out of all the new Federal powers exerted by the Bill selects as constitutionally deficient the one which seems authoritatively established beyond doubt or criticism, namely, the power to draft the National Guard, or organized militia, of the several States into the Federal Army. Though the argument fails to recognize, indeed denies, the basis of such Federal authority, more strangely still it proceeds to sustain it, extra-constitutionally as it were, by resort to a theory that is destructive of all balance between the Nation and the States.

That theory, as unnecessary as unsound, merits here a moment of consideration. The proposition is that Congress is without power to provide for drafting the organized militia into the Army of the United States, because such is not one of the constitutional purposes for which the militia may be called into the Federal service. But sanction is sought for legislation thus assumed to be unconstitutional in the acceptance by the States of the Federal pecuniary aid appropriated on condition of State compliance; and thus, it is said, "the States will waive their right to object to the action of Congress under the terms thereof," and, as for the individual members of the Guard, their enlistment oath to defend the United States and obey the orders of the President "would seem to constitute an express waiver of their constitutional right to object to draft for other than the constitutional specified purposes." Poise is likely to be lost in contemplating a statement like this:

"Congress accomplishes this result [that is, using the militia for an assumed unconstitutional purpose] by using its constitutional power to organize the militia to abolish the constitutional limitations placed

on its use of the militia. A state is given the choice of having no militia or one unprotected by constitutional guarantees. The net result is that the old sort of militia, known to the Constitution, is to be done away with."

Such an argument clashes with reason as its consequence clashes with fundamental law. Surely neither the argument nor its consequence is appreciated. See what it means: Legislation which it was incompetent for Congress to enact, because transgressing the limit of its power and invading that expressly reserved to the States, may nevertheless be validated by being accepted or acquiesced in by State legislation which it was equally incompetent for the State to enact. Constitutional amendment by unconstitutional statute; by unlawful agreement between Congress and the State legislature; by purchase, indeed!

My interest, however, lies in the proposition that the militia cannot be drafted into the Federal army, rather than in the theory suggested to sustain it. The draft section is the capstone if not the keystone of the military structure which it was the purpose of the Bill to provide. "Federalize" was the key word of the agitation and debate which produced the legislative result, pervading the entire legislative environment. The Dick Bill had provided that the organized militia or National Guard, as such, should be available for use, like a Federal army, for general military purposes "either within or without the territory of the United States" (section 5). That declaration seemed to satisfy all (except perhaps those lawyers interested enough in the subject to read the limited purposes for which the Constitution had authorized the Federal use of the militia) until the Attorney General in 1912,[1] concurring with the Judge Advocate General of the Army, held in a well-considered opinion that there was no constitutional warrant for such general Federal use of the militia beyond the territory of the United States. To make the militia fit and available for general military use wherever a Federal army might be called upon to execute the national will has been the object of all the agitation since, and was the chief object of the Bill under discussion. But the most extreme "federalizationist," upon reflection, realized that the militia as such could not be so used; that the militia status served not as a basis for but a bar against such use, and that to make the militia so available

[1] 29 Op. 322.

the status of its members would have to be, not simply that of militiaman over whom the Federal government has only a limited constitutional control, but must become that of federal soldier — a member of the Army of the United States — over whom the Federal government has exclusive and plenary control. The Bill proceeds upon a theory, heretofore unquestioned, that the militiaman is a citizen having a duty to render Federal military service which is paramount to, and therefore not incompatible with, his obligation to render local militia service, and it is upon him as a citizen of the United States that section 111 of the Bill provides for imposing in the imminence of war the Federal military status. If the enlistment obligation alone (section 70) accomplishes such a change of status immediately, then the organized militia of the several States under the Bill is something more than what is suggested, and what apparently Congress intended to suggest, as the status of the "National Guard of the United States"; it becomes indeed *an Army of the United States*. Perhaps such is not the legal effect of the obligation, and certainly, speaking extra-judicially, Congress did not intend it so to be. The method adopted, then, to render the organized militia of the several States available for general Federal military service for war purposes out of the territory of the United States was a draft into the Army of the United States operative upon the members of the militia, not in their status as militiamen, but in their capacity as citizens, obliged as such to render to the Nation such military service as the Nation might require. Whatever may hereafter be found as to the validity and efficacy of some of the new Federal powers asserted by the Bill, the least questionable and most effectual element of federalization is to be found in the section criticized. True, Congress may draft any of its citizens without the preliminaries established by the Act; but now it has expressed the policy of especially preparing, rendering available for use, and using the members of the organized militia to the declared national end.

It is now asserted that this cannot be; that the organized militia by virtue of its status is constitutionally exempt from service in the armies of the United States. If so, what is attempted is in violation of the constitutional right of the citizen or in derogation of the reserved rights of the States. The Nation, then, in the realm of national defense is not, as our fathers said it was, supreme; it has not the superior right to the military service of all its citizens; as

to all those who offer themselves to, and are accepted by, the several States in their own local service, it has no rights at all. Such a question is one of prime legal and political importance, exigent now. It involves a principle which applies to a wider field than the militia, and goes indeed to the vitals of the Nation. It is worthy of a lawyer's serious consideration, and it is believed that brief study and reflection will bring the conviction that the Hay Bill is not subject to criticism for this particular assertion of Federal power.

The power of Congress to raise armies finds no limitation in any quarter. It finds none in the terms of the grant or in any other provision of the Constitution. And none can be implied out of deference to State or individual right without offending reason, historical precedent and legal principle. In the international realm, preservation of the Nation and of all its constituent elements is the dominant national purpose, and the national power conferred in unrestricted terms to that end finds no logical limitation in regard for subordinate elements that have divested themselves of their separate power of protection and conferred it upon the sovereign who might the more effectually exercise it all in their behalf. Even an unrefined philosophy detects the lack of wisdom in one who would seek protection from the storm by pulling his shelter down upon him. Legislative precedents and governmental practice, Federal and State, have never recognized any such immunity in the militia status. Drafts of State troops were resorted to during the Revolution,[2] and the Act of June 30, 1834, refers to "drafted militia" as in the service against Indians on our frontier. During the Confederation the States maintained an active militia and frequently used it to supply the requisitions made on them for regular soldiers in the continental army. In *Burroughs* v. *Peyton*, *post*, the court cites many instances where Virginia made up the deficiencies in her quota by requiring drafts from the militia by legislation which provided that —

"Each man so drafted shall be considered to all intents and purposes as a regular soldier, and shall serve as such for three years if the war should so long continue."

Throughout our history the States have recognized the feasibility of parting with their organized militia when a national crisis has

[2] 2 JOURNAL CONGRESS, 458, 459; 3 *idem*, 38.

demanded it. In the Civil War the States parted first with their active militia in raising their quotas for the Federal Army, and the State organizations with their members became, when mustered into the service, United States Volunteers. The same thing prevailed in the Confederacy during that period. In the War with Spain the Volunteer Army was raised in the same manner. Of course, in contemplation of law the militia has been taken not as militia, nor as militia organizations, but as individuals owing the Nation allegiance and service. Such a long-continued course of governmental conduct is not without significance.

The historic Draft Acts recognized no such theory of constitutional exemption. The Federal draft act of 1863 rendered liable to draft all able-bodied citizens of the United States, and all aliens who had declared their intention to become citizens, between twenty-one and forty-five years of age; and while providing for the acceptance of substitutes and for pecuniary commutation in lieu of service, it is a remarkable fact that the governors of the several States were the only officers of the States excepted from the provisions. The same was true of the Confederate conscript acts, and, though frequently attacked on the theory that they deprived a State of a necessary instrumentality and thus assaulted her indestructible character, the courts of the Confederate States, as will later be shown, condemned the contention. It is significant also that Federal law providing for the army, including the present National Defense Act, has never excluded members of the National Guard from enlistment in the Federal forces, although, indeed, it might be wise to do so as a matter of policy within legislative control.

Such historic considerations negative the suggestion that the draft of the organized militia into Federal armies trespasses upon the constitutional realm assigned to the State or offends against the constitutional right of the citizens comprising the militia and thus drafted.

But the dominant character of this Federal power is more firmly established on legal grounds. Judicial authorities accord in sustaining these propositions:

1. There are no limitations, express or implied, upon the Federal power to raise and support armies, or upon the method or manner of the exercise thereof; and, specifically,

2. The Federal government is not dependent upon the will, either of the citizens or of the State, to carry that power into effect; and, more specifically still,

3. The power to call out the militia, itself a compulsory service, does not limit the power to raise and support armies, nor is the latter power subordinate to the power conferred over the militia.

The Supreme Court of the United States in *Tarble's Case*[3] said:

"Among the powers assigned to the National government is the power 'to raise and support armies' and the power 'to provide for the government and regulation of the land and naval forces.' The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine without question from any State authority how the armies shall be raised, whether by voluntary enlistment or forced drafts, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what constitutes military offenses, and prescribe their punishment."

And, continuing —

"No interference with the execution of this power of the National government in the formation, organization and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service."

The rights of the citizen do not countervail the right of the Nation in the realm of national defense. As was said in *In re Grimley*,[4] —

"The government has the right to the military services of all its able-bodied citizens; and may, when emergency arises, justly exact that service from all."

And, as was adverted to by Mr. Justice Harlan delivering the opinion of the court in *Jacobson* v. *Massachusetts*,[5] —

". . . he [the citizen] may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense."

[3] 13 Wall. 397, 408.

[4] 137 U. S. 147, 153 (1890).

[5] 197 U. S. 11, 29 (1904).

A volume of judicial pronouncement recognizes, without a discordant note, the unlimited character of this Federal power.[6]

The Federal draft acts were tested in the courts and sustained in *McCall's Case*[7] and *Kneedler* v. *Lane*,[8] upon the theory of the full and unrestricted character of the constitutional grant. And the constitutionality of the Confederate conscript acts, which was much more vigorously contested, was sustained upon the same ground by the courts of the Confederate States without exception.

Such constitutional canon pronounced by the highest court of the nation repels the contention and closes the door to the argument that the militia status furnishes an exemption from the operation of the vital national power, though the court has had no opportunity to apply the canon to the specific question. But in several instances the highest courts of the Confederacy did have such occasion, and in every instance rejected all such contentions in opinions justly celebrated for their cogency, learning, and completeness of disposition.

In *Ex parte Coupland*[9] the Supreme Court of Texas, in disposing of the contention in the course of an admirable opinion, said:

"The fallacy of the position seems to be manifest from the qualifications which they are forced to give it. For, as we have shown, the citizen has no right to exercise volition, with regard to the performance of military duty, so as to impair, or qualify the power of congress to raise armies, and, if the qualification exists by reason of the rights of the State over the arms-bearing citizens as its militia, and to appoint their officers when in the service of the Confederate States, these rights could not surely be affected by the voluntary action of the citizen. Nor can the difficulty be gotten over by saying that it is further to be assumed that the State must be presumed to have consented to his voluntary enlistment; for it is as impotent as the citizen to destroy in this manner a constitutional right conferred upon congress, or thus to confer one not otherwise given. . . . The individual is equally an arms-bearing citizen whether

[6] See Dynes *v.* Hoover, 20 How. 65 (1857); Johnson *v.* Sayre, 158 U. S. 109, 114 (1894); *Ex parte* Milligan, 4 Wall. 2, 139 (1866); United States *v.* Sweeny, 157 U. S. 281, 284 (1894); United States *v.* Bainbridge, Fed. Cas. 14, 497 (1816); United States *v.* Blakeney, 3 Gratt. (Va.) 405 (1847); Commonwealth *v.* Gamble, 11 Serg. & R. (Pa.) 93 (1824); Commonwealth *v.* Morris, 1 Phila. 381 (1852); *Ex parte* Brown, 5 Cranch (U. S. C. C.) 554 (1839); and the cases hereinafter discussed.

[7] 5 Phila. 259, 268 (1863).

[8] 45 Pa. St. 238 (1863).

[9] 26 Tex. 386, 396 (1862).

he goes into the service voluntarily, or otherwise. For surely the doctrine is not to be advanced that individuals, companies, or regiments of the 'well-regulated,' arms-bearing citizens 'necessary to the security of a free State,' which has been organized, armed, and disciplined as provided for by congress, and for whom a call is made by the Confederate States, in pursuance with the constitution, cease to be integral parts of the arms-bearing citizens of the State, because they prefer to volunteer their services directly to the Confederate government, and it is willing thus to accept them.

"It is said, however, that . . . the control of the State over its militia may be entirely destroyed; but would not the result be the same if an equal number of its militia were to volunteer into the service of the Confederate States? The truth of the matter is, that when the citizen goes into the army raised by Congress, either voluntarily or in obedience to the law requiring him to do so, he does this as a citizen, and not as a militiaman. Congress has not the right to raise armies in either mode, beyond the necessities of the Confederate government for carrying into effect its granted powers. But in either case the citizen, when placed in its service, is temporarily withdrawn from the control of the State as a militiaman. For the time being the right of the State, or, more properly speaking, the right of the State government over him, must yield to the more pressing and important demand for his services by the Confederate government to enable it to discharge the duties for which it has been authorized to raise and support armies."

And further on the court said:

"The origin of this grant of power to raise armies shows most conclusively that it was not intended to leave the Government dependent upon the will either of the citizen or the State to carry it into effect. It is given in our constitution, as it was originally in the constitution of the United States, and was placed in that for the purpose of correcting one of the leading defects in the articles of confederation, experience having proved it absolutely essential, not only to the safety, but to the very existence of the Confederacy." [10]

Then, inquiring as to what disposition the sovereignty of the people had made of its right to military service from all its citizens between the two agencies by which they proposed to administer their government, the court further said:

"We find that it has given to its Confederate agency, so to call it, the sole power to determine upon the questions of war and peace, and that it

[10] Page 399.

has consequently made it the duty of that agent to protect the State itself, and its local agency from attacks from both domestic and foreign foes, and that it has clothed it with the power to do this, by authorizing it to raise and support armies, and to provide and maintain a navy, to the extent that in its judgment it should deem necessary. . . . These agencies, though possessing distinct powers, have to look for their performance to the citizens, and, consequently, as in many other grants of power to them, their action is concurrent over the same subject matter, and at times may thus present seemingly conflicting grants of power. What then is to be their construction? The answer is plain. The limited and subordinate must yield to the general and superior. Consequently, such as usually pertain to, or are indices of sovereign power must control, and be regarded as superior to those of a local and domestic character. Ordinarily there would be no appreciable conflict between these grants of power, as the number of citizens the Confederate government would require for its armies would be so inconsiderable with reference to the bulk of militia, left under control of the local government, as to be, for practical purposes, unimportant to the latter. But great emergencies like that which now exist, will sometimes arise when the Confederate government is forced to exercise the entire military power that has been granted to it; and there is consequently a call for the great bulk of the arms-bearing citizens into its armies, and a corresponding diminution of those under the immediate control of the State government under the laws governing the militia." [11]

In *Burroughs* v. *Peyton*,[12] the Court of Appeals of Virginia said:

"It is true that the constitution does recognize the militia, and provides for using it, as well as regular armies, in the military service of the country. Well-regulated militia has (as is stated in one of the amendments) always been regarded as necessary to the security of a free state. It was therefore proper that provision should be made in the constitution for its organization, and for that authority to be exercised over it by the State governments, and Congress respectively. It was not probable that in the exercise of the power to raise armies, Congress would, under ordinary circumstances, materially diminish the number of the militia. But it cannot be true that, with a view to preserving the militia entire, it was intended to deny to Congress the right to take individuals belonging to it into the regular army. This construction would prevent Congress from obtaining from its ranks not only conscripts but volunteers also;

[11] Page 403.

[12] 16 Gratt. (Va.) 470, 482 (1864).

but as the militia embraces the whole armsbearing population, it would render it necessary that the army should contain none but foreigners hired for the purpose, and having no interest in common with the people of the country. No one can imagine that such was the intention of the framers of the constitution.

"The true interpretation of the constitution in reference to this matter would seem to be that the power to use the whole military force of the country was conferred upon Congress, and it was left to their discretion to fix, as the varying necessities of the country might require, the relative proportion of regular troops and militia to be employed in the service. If it should appear at any time to be appropriate to increase the army, it might be done by taking men from the militia either as volunteers or as conscripts — the action in either case being upon the individual citizen, and not upon the militia as an organized body. As it was impossible to foresee how large an army the exigencies of the country might demand, the number of militiamen to be thus transferred to its ranks was wisely left to the discretion of Congress."

In *Ex parte Tate*[13] the Supreme Court of Alabama said:

"Until he [the militiaman] ceases to be a citizen, with the rights and duties which appertain to citizenship, he cannot exonerate himself, nor be exonerated by the legislative power, from the obligations which inherently attach to that relation. Protection is his right, and allegiance his duty, so long as he remains a citizen; and the highest duty of allegiance is to respond to the call of his country for soldiers, when her liberty, including his own, is threatened, and her existence endangered by an invading enemy."

In *Fitzgerald* v. *Harris*[14] the Supreme Court of Georgia, after holding that Congress could not grant irrepealable exemption from draft, used the following significant language:

"Even in war, when it becomes necessary to send into the field a larger portion of the population, it is greatly desirable that another portion be left at home. There are always men who can be more useful at home than others and more useful there than in the field. As in the raising of armies, the Congress is not bound to take the whole population, nor even the whole of a class (where resort is had to classification), in the exercise of a sound discretion, exemption may be granted as incidental to the general power, but they must be always revocable at the will of the Congress. No man or set of men can be placed without the pale of legislative control in this matter for a single day."

[13] 39 Ala. 254, 268 (1864).

[14] 33 Ga. (Supp.) 38, 54 (1864).

In *Barber* v. *Irwin*,[15] another case in which the constitutionality of the Confederate conscript law was brought into question and again held valid, it was objected, among other things, that the unlimited power of Congress to place all citizens capable of bearing arms in the Army of the Confederate States is incompatible with State sovereignty and may be so exercised as to deprive them of their right to enforce their police power or to execute the mandates of their courts. To this argument the court replied that:

"Public exigencies, and especially military exigencies, require that the Legislature be entrusted with ample powers. If the presumption, that no power susceptible of abuse could have been intended to be given, is to govern, in the construction of the constitution, the palpable result is, that our government is too weak to accomplish the ends for which it was instituted. In the language of Gov. Troup, so understood, 'it is the weakest and most contemptible Government on earth; it is neither fit for war nor peace.' " [16]

Adverting to the admission in argument that in order to meet invasion Congress, by calling out the militia, had the power to place in actual military service all men capable of bearing arms, even to the last man, the court commented as follows:

"Now, this done, what becomes of the sovereignty of the States, so jealously guarded, in construing the other clause? Where would be their police force; where their sheriff's *posse comitatus?* Why is the presumption so vigorously wielded against one power allowed to slumber when the other is invoked?" [17]

In *Jeffers* v. *Fair*[18] it was argued that the proceeding by which the plaintiff-in-error was held in custody was a virtual calling forth of the militia and violated the Constitution in that it took from the State the right of appointing officers of the militia so called forth. The court replied that:

"This argument rests upon the fact that the men now being enrolled for service in the army, have been previously enrolled in the States as militiamen. The simple and obvious reply is, that the status of the citizen is not merged in the militiaman; that the fact of enrolment with

[15] 34 Ga. 27 (1864).
[16] Page 36.
[17] Page 37.
[18] 33 Ga. 347 (1862).

the militia does not exempt him from other duties and liabilities of citizenship." [19]

The above cases demonstrate the principle of the draft provision of the Bill, and its soundness.

Coming back to the Bill, care should be taken not to confuse the authority to draft the militia as well as all other citizens under the power "to raise and support armies" [20] with the power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." [21] The latter power is invoked by section 101 of the Bill which contemplates the call of the National Guard as such, that is, as organized militia, for the specified constitutional purposes. When in the active service of the United States under such a call, the militia serves as militia of the several States though subject, of course, for the time being, to the exclusive government by Congress. But the power to raise armies is invoked by section 111, providing for the draft of the members of the militia into the Army of the United States for war purposes; in such a case, they are not drafted as militia, nor do they serve as militia, but as members of the Army of the United States. Accordingly the section expressly declares that "all persons so drafted shall, from the date of their draft, stand discharged from the militia." A militiaman, organized or unorganized, is a citizen. Concededly an unorganized, or reserve, militiaman is subject to draft; otherwise, since all arms-bearing citizens are such militia, whence shall our armies come? An organized militiaman is no less a citizen and is much better prepared, largely at Federal expense, to make an effectual contribution to the country's cause in time of war.

Judged by Marshall's canon or any other reasonable rule, Congress not only has the right to take those who are the best prepared to defend the Nation, but it also has the duty.

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[19] Page 353.
[20] Art. I, sec. 8, cl. 12.
[21] Art. I, sec. 8, cl. 15.